STATE OF MICHIGAN

COURT OF APPEALS

GEORGE L. WILSON, Plaintiff-Appellee,	UNPUBLISHED February 9, 2006
v	No. 256222 Macomb Circuit Court
DANIEL J. HENRY, JR., Defendant-Appellant.	LC No. 2003-002673-CK

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant appeals by leave granted a circuit court order that denied his motion to file a notice of nonparty fault identifying a recently-dismissed defendant, Laser Specialist, Inc. (LSI). We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

The dispute between the parties stems from a failed land contract between George L. Wilson (plaintiff), as the owner of an industrial building, and Daniel J. Henry, Jr., (defendant). Defendant occupied a small portion of the building during the periods in question, and Laser Specialist, Inc. (LSI), occupied most of the building. After defendant failed to make required payments, plaintiff obtained a judgment of possession in district court and a writ of restitution. Plaintiff took possession of the property on May 20, 2003. In June of 2003, plaintiff brought a four-count complaint against defendant and LSI. Two counts are pertinent to the present appeal: unpaid rent and damages to the building after forfeiture of the land contract. The trial court ruled on several pending motions in an opinion and order dated April 14, 2004. With respect to the two counts at issue in this appeal, the court denied summary disposition and dismissed plaintiff's claims against LSI. Defendant motioned to file a notice of nonparty fault with respect to LSI and the trial court denied the motion because defendant failed to provide the necessary documents to support his arguments. Defendant filed an application for leave to appeal the denial of the motion, which was granted by this Court.

II. STANDARD OF REVIEW

This case involves the interpretation and application of a court rule and statutes, which are questions of law that this Court reviews de novo. *Haliw v Sterling Heights*, 471 Mich 700,

704; 691 NW2d 753 (2005); *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. ANALYSIS

As part of tort reform legislation, the Legislature replaced joint and several liability in tort actions with "fair share liability," except in certain limited circumstances not applicable here. *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001); *Rinke v Potrzebowski*, 254 Mich App 411, 415; 657 NW2d 169 (2002). The change was put into effect by modifications to existing statutes and enactments of new statutes. Thus, MCL 600.2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Pursuant to MCL 600.6304(1)(b), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, and which involves the fault of more than one person, including third-party defendants and non-parties, the court shall instruct the jury to answer special interrogatories, or itself make specific findings indicating the percentage of the total fault of all persons who contributed to the death or injury, regardless of whether that person was or could have been named as a party to the action. The fault that is assessed against a nonparty does not subject the nonparty to liability but is used to accurately determine the fault of named parties. MCL 600.2957(3).

However, the fault of a nonparty cannot be considered unless the defendant gives notice as provided in MCR 2.112(K). *Rinke*, *supra* at 415; MCR 2.112(K)(2).

MCR 2.112(K)(3) states:

> (a) A party against whom a claim is asserted may give notice of a claim that a nonparty is wholly or partially at fault. A notice filed by one party identifying a particular nonparty serves as notice by all parties as to that nonparty.
>
> (b) The notice shall designate the nonparty and set forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault.
>
> (c) The notice must be filed within 91 days after the party files its first responsive pleading. On motion, the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.

The trial court's role in applying the rule is limited. Where the notice is filed within 91 days after the first responsive pleading, the party need not obtain the court's approval. It is only where the party seeks to file a notice after this period that the party must obtain the court's permission. Even with respect to a late filing, the court's discretion is limited; "the court *shall* allow a later filing" if the facts were not and could not have been known with reasonable diligence and the late filing does not result in unfair prejudice to the opposing party. MCR 2.112(K)(3)(c).

The limited grounds for denying a motion to file a notice of nonparty fault were not present here.

First, "the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier . . . ." MCR 2.112(K)(3)(c). After, plaintiff agreed to dismiss its claims against LSI, the trial court entered an order dismissing the claims on April 14, 2004. On April 19, 2004, while defendant's application for leave to appeal that order was pending in this Court, defendant filed a notice of nonparty fault with respect to LSI, and then, on April 26, 2004, defendant filed a combined motion and brief for leave to file notice of nonparties at fault. The need for filing a notice was not apparent until plaintiff's claims against LSI were dismissed on April 14, and therefore, "the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier . . . ." MCR 2.112(K)(3)(c). Cf. *Salter v Patton*, 261 Mich App 559, 567; 682 NW2d 537 (2004).

Second, there is no basis for concluding that the late filing will result in unfair prejudice to plaintiff. Plaintiff was aware of the potential liability of LSI. Plaintiff named LSI as a defendant in his complaint (filed in June 2003) and pursued his claims against that entity. The discovery cut-off date was April 12, 2004. LSI was not dismissed from the case until April 14, 2004. There is no basis for plaintiff to claim that he would be unfairly prejudiced by a notice of nonparty fault with respect to LSI.

The basis for the trial court's denial of defendant's motion was that defendant would be able to litigate LSI's responsibility by way of a separate cause of action for contribution or indemnification. As our Supreme Court explained in *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 50-53; 693 NW2d 149 (2005), the tort reform legislation did not abolish a tortfeasor's right to contribution, although it rendered it unnecessary in many situations. But the statutory tort reform provisions and the court rule do not indicate that their mandates are affected by the availability of a claim for contribution. Contrary to the trial court's ruling, the availability of a separate cause of action for contribution or indemnification between a party and a nonparty is not a basis for denying a motion for leave to file a notice of nonparty fault.

Defendant asserts that the notice of nonparty fault should apply to both Count II (for holdover rent) and Count III (for property damage).

The allocation of fault provisions apply to "an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death. . . ." MCL 600.2957(1); MCL 600.6304(1). Although MCR 2.112(K) appears to apply only to "actions for personal injury, property damage and wrongful death," this Court explained that the rule requires

allocation of liability in other tort-based actions. *Holton v A+ Ins Ass'n, Inc*, 255 Mich App 318, 323-324; 661 NW2d 248 (2003) (negligent procurement of insurance coverage).

Count III for damage to plaintiff's building is "an action based on tort or another legal theory seeking damages for . . . property damage . . . ," MCL 600.2957(1); MCL 600.6304(1), and an action "for property damage . . . ," MCR 2.112(K)(1). The allocation of fault provisions apply to this type of action.

However, Count II for "holdover rent" is essentially an action against a vendee (defendant) for the reasonable rental value after default on a land contract. Recovery is allowed on the theory of an implied promise to pay. See *Durda v Chembar Dev Corp*, 95 Mich App 706; 291 NW2d 179 (1980); see also *Dwight v Cutler*, 3 Mich 566 (1855); *Hogsett v Ellis*, 17 Mich 351 (1868). Thus, Count II is not an action based on tort or an action for "property damage" to which the allocation of fault provisions would apply. MCL 600.2957(1); MCL 600.6304(1); MCR 2.112(K).

Therefore, the trial court erred in denying defendant's motion to file a notice of nonparty fault. On remand, the trial court shall allow plaintiff to file the notice with respect to LSI, but only with respect to plaintiff's Count III for damage to the property.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette